(1) Supreme Court, U.S.
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No. 99-

IN THE

Supreme Court of the United States

COMMONWEALTH OF PENNSYLVANIA,

Petitioner,

v.

DOUGLAS LOOMIS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Pennsylvania Superior Court err in striking as violative of the Fourteenth Amendment to the United States Constitution those sections of Pennsylvania's Title 42 referring to the designation of a "sexually violent predator"?

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OPINIONS BELOW

The order and opinion of the Superior Court of Pennsylvania reversing the Judgment of Sentence from the Court of Common Pleas of Luzerne County are unreported and are reprinted in Appendix A.

The sentencing order of the Court of Common Pleas of Luzerne County is unreported and is reprinted in Appendix B.

The order of the Supreme Court of Pennsylvania denying discretionary review is unreported and is reprinted in Appendix C.

STATEMENT OF JURISDICTION

The judgment of the Supreme Court of Pennsylvania denying the petition for allowance of appeal was attested by order dated July 29, 1999. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISION INVOLVED

The United States Constitution, Amendment XIV, provides in pertinent part as follows:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor any to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Respondent, Douglas Loomis, was convicted by a jury of five (5) counts of rape, one (1) count of involuntary deviate sexual intercourse, eleven (11) counts of criminal solicitation, four (4) counts of endangering welfare of children, five (5) counts of corruption of minors, and eight (8) counts of indecent assault. The trial court subsequently directed the Sexual Offender's Assessment Board to perform an assessment of Respondent in accordance with 42 Pa. C.S.A. § 9791, *et seq.* ("Megan's Law").

After the verdict, the trial court entered an order directing the Sexual Offenders Board to examine Respondent, in accordance with 42 Pa. C.S.A. § 9791, *et seq.* (hereinafter "Megan's Law"). The Board found that Respondent fit the profile of a sexually violent predator. The trial court held an evidentiary hearing, and determined that Respondent was a sexually violent predator. The court subsequently sentenced Respondent to a term of incarceration of sixty-six (66) years and nine (9) months to life.

Respondent appealed to the Superior Court of Pennsylvania, raising a number of constitutional challenges to Megan's Law.

The Superior Court vacated Respondent's judgment of sentence. The Superior Court relied on its judgment in *Commonwealth v. Halye*, 719 A.2d 763 (Pa. Super. 1998), in which it found that the provisions of Megan's Law which require a defendant to rebut a presumption, and which do not impose on the Commonwealth a burden of persuasion by clear and convincing evidence, violate the due process clause of the federal constitution. The court struck as unconstitutional all of the sections of Megan's Law which refer to the designation of a "sexually violent predator."

The Commonwealth subsequently sought discretionary review in the Supreme Court of Pennsylvania. The Supreme Court denied the Petition by order dated July 29, 1999.

The Pennsylvania Supreme Court subsequently decided the case of *Commonwealth v. Williams*, 733 A.2d 593 (Pa. 1999). In *Williams*, the Supreme Court agreed with the Superior Court's judgment in *Halye*, and held that the procedure for determining whether a fender is a sexually violent predator under Megan's Law violated the procedural due process protections of the United States Constitution.

The Commonwealth of Pennsylvania now seeks review of the federal issues raised in the instant case by the United States Supreme Court.

REASONS FOR GRANTING THE WRIT

The instant case stems from the decisions of the Pennsylvania Superior and Supreme Courts which struck 42 Pa. C.S.A. § 9794, and all other sections of Pennsylvania law that referred to the designation of "sexually violent predator", as unconstitutional. The Pennsylvania courts have held that the provisions that require a defendant to rebut the presumption that he is a sexually violent predator, and that do not instead impose on the Commonwealth a burden of persuasion by clear and convincing evidence, violate the due process clause of the Federal Constitution.

The Petitioner maintains that the issue in the instant case raises an important question of federal law that has not been, but should be, settled by this Court. At least forty-nine (49) states have passed similar legislation with regard to sentencing and\or notification with regard to sexual

offenders. *E.B. v. Verniero*, 119 F.3d 1077, 1081 (3rd Cir. 1997). The issues involved in this in similar cases have a tremendous impact on the protection of the public and the states' abilities to set forth penal laws governing the types of criminal conduct at issue in this case. This Court must provide the states with guidance as to the limits of their abilities to punish offenders in this regard and to protect the public. It is imperative that the limits of the Fourteenth Amendment in this regard be clearly delineated by this Court.

Furthermore, the Petitioner maintains that the state courts of Pennsylvania have decided this vital federal issue in a way that conflicts with relevant decisions of this Court. Petitioner maintains that the laws reversed in this case do not violate federal guarantees of procedural due process. Under Megan's Law, an individual convicted of one of the offenses enumerated in 42 Pa. C.S.A. § 9793(b) is presumed to be a sexually violent predator, and the offender has the burden of proving by clear and convincing evidence that he or she should not be assessed as a sexually violent predator. 42 Pa. C.S.A. § 9794(b).

This statute is not unique in Pennsylvania jurisprudence for imposing a sentencing presumption as the result of a conviction. *See* 42 Pa. C.S.A. § 9714(b) ("Presumption of high risk dangerous offender"). Further, unlike presumptions struck down for improperly permitting a fact finder to improperly infer an element of an offense beyond a reasonable doubt, the presumption at issue herein does not go before the fact finder at the guilt phase of a trial, and the Commonwealth's burden to prove all the elements of the enumerated offenses is not lessened in any manner. "[I]n criminal cases, the ultimate test of any device's constitutional validity in a given case remains constant: the

device must not undermine the fact finder's responsibility at trial, based on evidence adduced by the State, to find the ultimate facts beyond a reasonable doubt." *County Court of Ulster County v. Allen*, 99 S. Ct. 2213 (1979).

> The function of a standard of proof as that concept is embodied in the Due Process Clause and in the realm of fact finding, is "to instruct the fact finder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication."

Cooper v. Oklahoma, 116 S. Ct. 1373, 1381 (1996) (citations omitted). There is nothing irrational or arbitrary about presuming that an individual who has already violently violated the privacy and well-being of another individual, and the community's sense of security, is likely to engage in similar behavior in the future. *United States v. Salerno*, 107 S. Ct. 2095 (1987). There is nothing inherently unattainable about a prediction of future criminal conduct. *Id.* at 2103-2104.

Despite the propriety of this presumption, however, Megan's Law adds protection for a defendant by providing for an assessment by the Board and court review of that assessment. A defendant is thus given a viable avenue to dispel the presumption.

In the present case, the Respondent's guilt has already been established beyond a reasonable doubt. "Decisions made in sentencing do not as deeply implicate a defendant's rights as do decisions made regarding guilt or innocence. Once criminal proceedings reach the sentencing stage, the decision has already been made that the defendant can be deprived of his liberty." *United States v. McDowell*, 888 F.2d 285, 290 (3d Cir. 1989).

> Of course, the burden of going forward with the evidence at some stages of a criminal trial may be placed on the defendant, but only after the State has "proved enough to make it just for the defendant to be required to repel what has been proved with excuse or explanation. . . ."

Speiser v. Randall, 78 S. Ct. 1332, 1341 (1958). Respondent, at the assessment hearing, attempted to avoid the mandatory maximum sentence. Under such circumstances the shifting of the burden to a defendant is proper:

> It therefore logically follows that the burden of ultimate persuasion should rest upon the party attempting to adjust the sentence. Thus, when the Government attempts to upwardly adjust the sentence, it must bear the burden of persuasion. This prevents the criminal defendant from having to "prove the negative" in order to avoid a stiffer sentence. . . . Conversely, when the defendant is attempting to justify a downward departure, it is usually the defendant who bears the burden of persuasion. . . . This is simply an extension of our pre-guidelines analysis in *United States v. Garcia*, 544 F.2d 681 (3d. Cir. 1976), in which we held that "[o]ne who affirmatively seeks special favor at sentencing has the burden of proving why it should be bestowed."

United States v. McDowell, 888 F.2d at 291; *see also Medina v. California*, 112 S. Ct. 2572 (1992) (no constitutional violation in requiring a defendant who alleges incompetence to stand trial to bear the burden of proving so by a preponderance of the evidence); *Leland v. Oregon*, 72 S. Ct.

1002 (1952) (state statute requiring a defendant to prove insanity beyond a reasonable doubt was not violative of Due Process as state was still required to prove every element of the offense beyond a reasonable doubt); *Williams v. People of the State of New York*, 69 S. Ct. 1079, 1085 (1949) ("The due process clause should not be treated as a device for freezing the evidential procedure of sentencing in the mold of trial procedure. So to treat the due process clause would hinder if not preclude all courts — state and federal — from making progressive efforts to improve the administration of criminal justice.").

CONCLUSION

The Pennsylvania courts have decided cases that raise an important federal question that has not been settled by this Court, and have done so in a way that conflicts with relevant decisions of this Court. Accordingly, public policy mandates the grant of the instant Petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A — MEMORANDUM AND JUDGMENT OF THE SUPERIOR COURT OF PENNSYLVANIA DATED AND FILED MARCH 3, 1999

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 683 Harrisburg 1998

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

DOUGLAS LOOMIS,

Appellant

Appeal from Judgment of Sentence entered March 19, 1998, in the Court of Common Pleas of Luzerne County, Criminal Nos. 1734, 1807 of 1996 and No. 144 of 1997

BEFORE: KELLY, J., EAKIN, J. and CIRILLO, P.J.E.

MEMORANDUM:

Appellant Douglas Loomis challenges the constitutionality of the Registration of Sexual Offenders Act, commonly known as Megan's Law.[1] For the reasons that follow, we vacate his sentence and remand for resentencing.

Following a jury trial, appellant was convicted of one count of aggravated indecent assault, six counts of

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1. 42 Pa.C.S. § 9791, *et seq.*

endangering welfare of a child, seven counts of corruption of minors, six counts of indecent assault, five counts of rape, one count of involuntary deviate sexual intercourse, and six counts of criminal solicitation. The Commonwealth gave notice it would proceed at sentencing pursuant to Megan's Law, seeking the mandatory maximum sentence of life imprisonment for sexually violent predators provided by Section 9799.4(a) of the Act. Accordingly, the trial court initiated procedures to determine whether to classify appellant as a sexually violent predator. Appellant was assessed by the Sexual Offenders Assessment Board and the court reviewed the findings. At hearing just prior to sentencing, after appellant presented no evidence to rebut the presumption of his status as a sexually violent predator, the court determined him a sexually violent predator.

At sentencing, appellant filed a motion styled as "Motion for Extraordinary Post-Verdict Relief/Presentence Motion" seeking to challenge the constitutionality of Sections 9792, 9794, 9798 and 9799.4 of Megan's Law. The court denied the motion and, in accordance with the maximum sentencing requirements of Section 9799.4, imposed an aggregate sentence of sixty-six years and nine months to life imprisonment.

This appeal followed. Recently, an *en banc* panel of this Court reviewed the constitutionality of Megan's Law on the same grounds challenged by appellant herein, ***Commonwealth v. Halye***, 719 A.2d 763 (Pa. Super. 1998) (*en banc*),[2] and held certain provisions of the Act were

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2. The appellant in ***Halye*** raised the following constitutional challenges: (1) whether the adjudication and notification (Cont'd)

unconstitutional.[3] Following the analytical lead of the Third Circuit in ***E.B. v. Verniero***, 119 F.3d 1077 (3d Cir. 1997) (examining New Jersey's Megan's Law), ***Halye*** concluded Section 9794 of the Act violates procedural due process under the Fourteenth Amendment to the United States Constitution in that it requires an offender to rebut a presumption that he is a "sexually violent predator" upon conviction of certain enumerated crimes. ***Halye*** held the Commonwealth should carry the burden of persuasion, by clear and convincing evidence, in a Megan's Law proceeding:

> This high standard of proof is constitutionally required where, as here, the designation of one as a "sexually violent predator" is separate and distinct from both the trial and sentencing and entails a fact-finding function. As noted, the

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(Cont'd)

requirements of the Act violate the double jeopardy clauses of the Pennsylvania and United States Constitutions; (2) whether the Act violates substantive due process; (3) whether the sexually violent predator provisions are unconstitutionally vague; (4) whether the sexually violent predator provisions subject defendants to cruel and unusual punishment prohibited by the state and federal constitutions; (5) whether the Act violates procedural due process because it fails to afford the defendant any opportunity to be heard and because it imposes the burden of persuasion on the defendant; and (6) whether the notification requirements of the Act violate state and federal rights to privacy.

3. ***Commonwealth v. Gaffney***, 702 A.2d 565 (Pa. Super. 1997), *appeal granted*, 710 A.2d 605 (Pa. 1998), which also addressed the constitutionality of Megan's Law, is presently before the Pennsylvania Supreme Court.

> designation has severe results and this measure of due process must be afforded an offender to protect against erroneous outcomes. . . . As a consequence, we strike as unconstitutional § 9794 of Title 42 and all remaining sections of the Act which refer to the designation of a "sexually violent predator."

Id., at 768-69.

Halye, of course, controls the disposition of this case; whether we agree with its rationale is of no moment. ***See, e.g., Commonwealth v. Koller***, 719 A.2d 1069 (Pa. Super. 1998) (J. Stevens, Concurring). ***Halye*** vacated the judgment of sentence and remanded for resentencing absent application of the stricken provisions of Megan's Law. Accordingly, we are constrained to vacate appellant's judgment of sentence and remand for resentencing in light of ***Halye***.

Judgment of sentence vacated; case remanded. Jurisdiction relinquished.

KELLY, J. concurs in the result.

Appendix A

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 683 Harrisburg 1998

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

DOUGLAS LOOMIS,

Appellant

Appeal from Judgment of Sentence entered March 19, 1998, in the Court of Common Pleas of Luzerne County, Criminal Nos. 1734, 1807 of 1996 and No. 144 of 1997

JUDGMENT

ON CONSIDERATION WHEREOF, *it is now here ordered and adjudged by this Court that the judgment of the Court of Common Pleas of* LUZERNE *County be, and the same is hereby* VACATED. CASE REMANDED. JURISDICTION RELINQUISHED.

BY THE COURT:

s/ [illegible]
PROTHONOTARY

Dated: MARCH 3, 1999

APPENDIX B — SENTENCING DISPOSITION SHEET OF THE COURT OF COMMON PLEAS, CRIMINAL DIVISION, COUNTY OF LUZERNE DATED MARCH 19, 1998

No. 22758

COURT OF COMMON PLEAS — CRIMINAL DIVISION COUNTY OF LUZERNE

THE COMMONWEALTH OF PENNSYLVANIA

vs.

DOUG LOOMIS

* * *

CHARGE: SEE BELOW

No. 144 of 1997
No. 1734-1807 1996

* * *

DATE March 19, 1998

* * *

DEFENSE MOTION TO VACATE PREVIOUS SENTENCE WAS *GRANTED* BY THE COURT. THE SENTENCE IS AS FOLLOWS

Appendix B

ON 1734 OF 1996 — AGGRAVATED IND. ASSAULT — S.C.I. 2½ YEARS TO 5 YEARS (MEGANS LAW)

ON 1734 OF 1996 — ENDGERING WELF/CHILD — S.C.I. 9 TO 18 MONTHS CONSECUTIVE NOT CONCURRENT

ON 1734 OF 1996 — CORRUPTION MINORS — S.C.I. 6 TO 12 MONTHS CONSECUTIVE NOT CONCURRENT

ON 1734 OF 1996 — INDECENT ASSAULT — S.C.I. 6 TO 12 MONTHS CONSECUTIVE NOT CONCURRENT

ON 1807 OF 1996 — ENDGERING WELF/CHILD — S.C.I. 9 TO 18 MONTHS CONSECUTIVE NOT CONCURRENT

ON 1807 OF 1996 — CORRUPTION OF MINORS — S.C.I. 6 TO 12 MONTHS CONSECUTIVE NOT CONCURRENT

ON 1807 OF 1996 — INDECENT ASSAULT — S.C.I. 6 TO 12 MONTHS CONSECUTIVE NOT CONCURRENT

ON 144 OF 1997 — RAPE S.C.I. — 5 YEARS TO 10 CONSECUTIVE NOT CONCURRENT

ON 144 OF 1997 — RAPE S.C.I. — 5 YEARS TO 10 CONSECUTIVE NOT CONCURRENT

ON 144 OF 1997 — RAPE S.C.I. — 5 YEARS TO 10 CONSECUTIVE NOT CONCURRENT

ON 144 OF 1997 — RAPE S.C.I. — 5 YEARS TO 10 CONSECUTIVE NOT CONCURRENT

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ON 144 OF 1997 — I.D.S.I. S.C.I. — 5 YEARS TO 10 CONSECUTIVE NOT CURRENT

ON 144 OF 1997 — RAPE S.C.I. — 5 YEARS TO 10 CONSECUTIVE NOT CONCURRENT

ON 144 OF 1997 — CRIMINAL SOLICITATION — 54 MONTHS TO 108 MONTHS CONSECUTIVE NOT CURRENT

ON 144 OF 1997 — CRIMINAL SOLICITATION — 48 MONTHS TO 96 MONTHS CONSECUTIVE NOT CURRENT

ON 144 OF 1997 — CRIMINAL SOLICITATION — 48 MONTHS TO 96 MONTHS CONSECUTIVE NOT CURRENT

ON 144 OF 1997 — CRIMINAL SOLICITATION — 48 MONTHS TO 96 MONTHS CONSECUTIVE NOT CURRENT

ON 144 OF 1997 — CRIMINAL SOLICITATION — 48 MONTHS TO 96 MONTHS CONSECUTIVE NOT CURRENT

ON 144 OF 1997 — CRIMINAL SOLICITATION — 48 MONTHS TO 96 MONTHS CONSECUTIVE NOT CURRENT

ON 144 OF 1997 — ENDGERING WELF/CHILD — 6 MONTHS TO 12 MONTHS CONSECUTIVE NOT CURRENT

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ON 144 OF 1997 — ENDANGER WELF/CHILD — 6 MONTHS TO 12 MONTHS CONSECUTIVE NOT CURRENT

ON 144 OF 1997 — ENDANGER WELF/CHILD — 6 MONTHS TO 12 MONTHS CONSECUTIVE NOT CURRENT

ON 144 OF 1997 — ENDANGER WELF/CHILD — 6 MONTHS TO 12 MONTHS CONSECUTIVE NOT CURRENT

ON 144 OF 1997 — CORRUPTION OF MINORS — 6 MONTHS TO 12 MONTHS CONSECUTIVE NOT CURRENT

ON 144 OF 1997 — CORRUPTION OF MINORS — 6 MONTHS TO 12 MONTHS CONSECUTIVE NOT CURRENT

ON 144 OF 1997 — CORRUPTION OF MINORS — 6 MONTHS TO 12 MONTHS CONSECUTIVE NOT CURRENT

ON 144 OF 1997 — CORRUPTION OF MINORS — 6 MONTHS TO 12 MONTHS CONSECUTIVE NOT CURRENT

ON 144 OF 1997 — CORRUPTION OF MINORS — 6 MONTHS TO 12 MONTHS CONSECUTIVE NOT CURRENT

Appendix B

ON 144 OF 1997 — INDECENT ASSAULT — S.C.I. — 6 MONTHS TO 12 MONTHS CONSECUTIVE NOT CURRENT

ON 144 OF 1997 — INDECENT ASSAULT — S.C.I. — 6 MONTHS TO 12 MONTHS CONSECUTIVE NOT CURRENT

ON 144 OF 1997 — INDECENT ASSAULT — S.C.I. — 6 MONTHS TO 12 MONTHS CONSECUTIVE NOT CURRENT

ON 144 OF 1997 — INDECENT ASSAULT — S.C.I. — 3 MONTHS TO 6 MONTHS CONSECUTIVE NOT CURRENT

TOTAL OF 66 YEARS AND 9 MONTHS TO 133½

DEFENDANT TO HAVE NO CONTACT OR COMMUNICATION WITH VICTIMS — PAY ALL COSTS, FINES & RESTITUTION

ALL SENTENCES ARE STATE SENTENCE — ALL ARE CONSECUTIVE TO EACH OTHER

THE COURT VACATED THE PREVIOUS SENTENCE OF MARCH 12, 1998

DEFENDANT REMANDED TO S.C.I.
DEFENDANT ADVISED OF APPEAL RIGHTS

CLERK JOHN HYDER CONAHAN JUDGE

APPENDIX C — ORDER OF THE SUPREME COURT OF PENNSYLVANIA FOR THE MIDDLE DISTRICT DENYING PETITION FOR ALLOWANCE OF APPEAL DATED JULY 29, 1999

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

No. 349 M.D. Allocatur Docket 1999

COMMONWEALTH OF PENNSYLVANIA,

Petitioner

v.

DOUGLAS LOOMIS,

Respondent

Petition for Allowance of Appeal
from the Superior Court

ORDER

PER CURIAM:

AND NOW, this 29th day of July 1999, the petition for allowance of appeal is denied.